Sports Shinko (Waikiki) Corporation, d/b/a Queen Kapiolani Hotel *and* Hotel Employees & Restaurant Employees' Union, Local 5, AFL–CIO. Cases 37–CA–2972, 37–CA–2973, 37–CA–2993, 37–CA–3205,[1] and 37–RC–3084

March 9, 1995

DECISION, ORDER, AND DIRECTION

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On August 23, 1994, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

The Respondent excepts to the judge's recommendation to overrule its election Objection 5.[4] The Respondent argues, among other things, that the Board agent failed to seal completely every edge of the ballot box, thereby impugning the integrity of the election process and requiring a new election.[5] We disagree.

The Board agent conducting the April 10, 1991 election testified that he tightly taped the ballot box. The box was taped in the presence of the parties' election observers, and neither observer claimed that it was inadequately sealed. Once the polls opened, the ballot box was visible to the observers throughout the split-session election. Between sessions, the box was at all times in the Board agent's exclusive possession. There is no allegation or evidence that anyone tampered with the ballot box. Indeed, the total number of ballots and challenged ballot envelopes retrieved from the ballot box equaled the number of individuals who voted, as shown by names that the election observers checked on the *Excelsior* list.[6] Finally, the judge, who scrutinized the box, concluded that it was securely taped, finding that there was ''simply no opening. There [was] merely a line where two pieces of cardboard join tightly . . . [to] . . . form a 'seal.'''[7]

In these circumstances, and for the additional reasons cited by the judge, we find that the evidence fails to establish that the manner in which the ballot box was sealed compromised the integrity of the election. Accordingly, we overrule Respondent's Objection 5.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sports Shinko (Waikiki) Corporation, d/b/a Queen Kapiolani Hotel, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) Warning, suspending, effectively discharging, or otherwise discriminating against employees for having engaged in union or other protected, concerted activities.''

2. Substitute the following for paragraph 2(c).

3. Substitute the attached notice for that of the administrative law judge.

''(c) Remove from its files any reference to the unlawful warning, suspension, or effective discharge, and notify John Gibbs in writing that this has been done and that none of these records will ever be used against him in any way.''

DIRECTION

IT IS DIRECTED that the Regional Director for Region 20 shall, within 14 days from the date of this De-

[1] The judge inadvertently omitted Case 37–CA–3205 from the case caption.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We have modified the proposed Order and notice to conform to the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) by unlawfully warning, suspending, and effectively discharging employee John Gibbs.

[4] This is the only objection before the Board.

[5] The Respondent additionally argues that the Board agent failed to follow the requirements of sec. 11318.4 of the Board's Casehandling Manual (Part II), Representation Proceedings, that the ballot box be ''closed and securely sealed.'' It is well settled that the provisions of the Casehandling Manual are not binding procedural rules. *Correctional Health Care Solutions*, 303 NLRB 835 (1991). These provisions are merely intended to provide operational guidance in the handling of representation cases. *Solvent Services*, 313 NLRB 645, 646 (1994). In any event, we agree with the judge that the evidence clearly establishes that the ballot box was securely sealed by the Board agent.

[6] *Excelsior Underwear*, 156 NLRB 1236 (1966).

[7] The ballot box itself (R. Exh. 44) was lost in the postal system after it was mailed from the Division of Judges' office in San Francisco, California, on August 23, 1994, to the Board's office in Washington, D.C. Thus, on October 6, 1994, wrappings from the exhibit were returned to the Judges' office with the stamped notation: ''**return to sender for replacement of contents** received without contents due to poor sealing and/or packaging by mailer.''

Although we were unable to examine the ballot box itself, we find that other record evidence, including extensive testimony and detailed photographs of the box, adequately depict the condition of the box at the time of the election.

cision, Order, and Direction, open and count the ballots of:

Saturnia Agonoy	Tina Low
Carodad Aloncel	Janet Moku
Federico Bagasoni	June Muraoka
Shareen Bailey	Narcissa Ocariza
Lynn Bautista	Estrelita Palafox
Ninyo Butcher	Judy Ann Rutkiewicz
Teodora Cabanizas	Verona Sales
Benita Calad	Jose Santiago
Walfredo Cardenas	Warlita Sinco
Kay Costa	Faye Takara
Jay Dolor	Shane Tokunaga
George Fukunaga	Ken Tomita
Yoshio Hanamoto	Sofia Tongotea
Frank Hara	Satusuki Toya
Phyllis Hisatake	Amelia Uipi
Helene Ishizaki	June Ushijuma
Simeon Kailihiwa	Katherine Yonamine
Wilton Kanahele	Ming Man Zhang
Peleaise Lotaki	

The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you concerning your own or other employees' union sympathies, activities, or leanings.

WE WILL NOT compel you to swear on the bible that you will vote against Hotel Employees & Restaurant Employees' Union, Local 5, AFL–CIO in a Board-conducted election.

WE WILL NOT keep your union activities under surveillance by photographing you while you are engaged in such union activities as meeting with representatives of the Union.

WE WILL NOT threaten that if you support a union it could lead to the loss of your job.

WE WILL NOT threaten that if you support the Union it may lead to the closure of our facility, thereby putting you out of a job.

WE WILL NOT warn, suspend, effectively discharge, or otherwise discipline employees because they have engaged in activities in support of the Union, or because they have engaged in other activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer John Gibbs immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discipline and effective discharge, less any net interim earnings, plus interest.

WE WILL notify John Gibbs, in writing, that we have removed from our files any reference to his warnings, suspension, or effective discharge, and we will assure him that none of these records will ever be used against him in any way.

SPORTS SHINKO (WAIKIKI) CORPORATION, D/B/A QUEEN KAPIOLANI HOTEL

Wanda Pate-Jones and *Mary Ann Pacacha, Esqs.*, for the General Counsel.

Jared Jossem and *Gregory Sato, Esqs. (Torkildson, Katz, Jossem, Fonseca, Jaffe, Moore & Heatherton)*, of Honolulu, Hawaii, for the Respondent.

Randy M. Girer, Esq. (VanBourg, Weinberg, Roger & Rosenfeld), of San Francisco, California, for the Charging Party/Petitioner.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in trial in Honolulu, Hawaii, on July 28–31 October 27–30 and January 26–29, 1993, and February 9–10. It is based on charges and a petition for representation election[1] filed by Hotel Employees & Restaurant Employees' Union, Local 5, AFL–CIO (the Union or Petitioner),[2] against Sports Shinko (Waikiki) Corporation, d/b/a Queen Kapiolani Hotel (Respondent or Employer),[3] alleging generally that Respondent engaged in violations of Section 8(a)(1),[4] (3),[5] and (5)[6] of the National Labor Relations Act (the Act), and that Respondent engaged in objectionable conduct affecting the results of election in Case 37–RC–3084.

These charges led to the issuance of a consolidated complaint by the Regional Director for Region 20 of the National Labor Relations Board, alleging numerous violations of Section 8(a)(1) between October 1990 and July 1991. It also alleges that Section 8(a)(3) of the Act was violated by the issuance of written warnings to employee John Gibbs on October 18, 1990, by suspending Gibbs on October 20, 1990, and by placing Gibbs in on-call status and terminating Gibbs on October 26, 1990. Counsel for the General Counsel withdrew certain other complaint allegations during the trial.

Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.[7]

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[1] The petition was filed on February 14, 1991.

[2] Sometimes also referred to as the Charging Party or the Petitioner.

[3] Sometimes also referred to as the Employer.

[4] Sec. 8(a)(1) of the Act provides that,

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

[5] Sec. 8(a)(3) of the Act provides that,

> It shall be an unfair labor practice for an employer
>
> by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

[6] Sec. 8(a)(5) of the Act provides that,

> It shall be an unfair labor practice for an employer—to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

[7] In its answer Respondent asserted a number of affirmative defenses. However, it neither argued these defenses further, nor fur-

Continued

A stipulated election agreement, approved on March 8, 1991, led to an election by secret ballot conducted on April 10, 1991, by the Regional Director. Thereafter, the Regional Director issued a Report on Objections and Determinative Challenged Ballots, and an order consolidating cases and notice of hearing in Case 37–RC–3084. In his report, the Regional Director recommended that, since the challenged ballots and objections raised substantial and material issues of fact, they be consolidated with Cases 37–CA–2972, 37–CA–2973, and 37–CA–2993 for hearing before an administrative law judge.

After trial had begun in this matter, on November 2, 1992, the Union filed a charge in Case 37–CA–3205. The Regional Director issued a complaint therein on December 17, 1992. Finding the issues in this new complaint closely related to the issues in the consolidated complaint mentioned earlier, I granted counsel for the General Counsel's motion to consolidate on December 31, 1992.

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Charging Party, and counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The consolidated complaint alleges, the answer of Respondent admits, and I find that Respondent is now, and at all times material has been, a Hawaii corporation, with an office and place of business in Honolulu, Hawaii, where it has been engaged in the operation of a hotel, providing food and lodging for guests; that during the 12 months preceding the issuance of the consolidated complaint, Respondent derived gross revenues in excess of $500,000 from the business operations just described; and that during the 12 months preceding the issuance of the consolidated complaint herein Respondent purchased and received at its Honolulu, Hawaii facility products, goods, and materials valued in excess of $5000 directly from points outside the State of Hawaii.

Accordingly, I find and conclude that Respondent is now, and at all times material has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *General Background and Labor Relations History*

Prior to the incidents described in this decision, the employees at Respondent's hotel were unrepresented. Respondent has no prior record of having violated the Act.

The Hotel operated by Respondent is located in an area of Honolulu called Waikiki, primarily frequented by tourists. It is bounded by Kapahulu Avenue, Cartwright Road, and Lemon Road.

Apparently during 1988 the Union began seeking authorization cards from the Hotel's employees, but that particular effort never reached the stage of an election.

Respondent, one of the larger resort and golf course developers and operators in the world, purchased the Hotel in June 1990. It hired virtually all of the former owner's employees, but claims that it had no knowledge of the organizational activities during 1988 or 1989. However, it is admitted that Sigeru Tomita, Respondent's general manager, had been long associated with Respondent's predecessor.

In early April 1990, the Union again began an organizing campaign, primarily targeting the Hotel's housekeeping and food and beverage departments. Ernesto Ugale was the Union's primary organizer at the site, and Eric Gill was the director of organizing at the Union's hall. Cards were secured through contacts made with employees, leading to the election mentioned above. The contacts were made in person, by mail, by telephone, and at meetings. Beginning in June 1990, Ugale also passed out flyers at the hotel site, at the employees' entrance, raising issues about working conditions and problems of the kitchen and housekeeping employees. Ugale also made personal contacts with several employees in April, as well as during June, July, and August.

Gill conducted meetings for employees of Respondent during August and September 1990. The meetings were conducted at the Union's headquarters, and authorization cards were passed out and solicited.

Employee Gibbs testified credibly that in mid-October 1990, while in the storage room at the Hotel, he heard Yoshida tell Komoto that people were then in the Hotel's lobby passing out cards, and that Komoto responded that he knew, and that he wasn't worried because the Hotel knew how to take care of it.

Further, Gibbs credibly testified that about a week later, while discussing the issue of unionism generally, he told Yoshida that if he would definitely vote for the Union.

I find, based on the above credible testimony of both Ugale and Gibbs, which was not contradicted, that Respondent could not have failed to have had knowledge of the organizational campaign, no later than mid-October 1990.

B. *The Respondent's Agents and Supervisors*

At trial, Respondent amended its answer to admit that: Estrelita Aceret, assistant executive housekeeper;[8] Gaylord Komoto, assistant general manager;[9] Ryan Leong, waithelp supervisor;[10] Mitsue Stone, assistant head housekeeper;[11] Merle Tokunaga, sales manager; Sigeru Tomita, General Manager; Blane Yoshida, Bell Captain);[12] and Donald Yoshimura, Front Office Manager are supervisors within the

nished any factual support for them. Accordingly, each affirmative defense is overruled.

[8] A direct supervisor of the maids and housekeepers working in the housekeeping department. She reports directly to Komoto.

[9] Komoto reports directly to Tomita.

[10] Leong reports directly to one Modi Lew, director of the food and beverage and department, who, in turn reports directly to Komoto and Tomita.

[11] Another direct supervisor of the maids and housekeepers working in the housekeeping department.

[12] Reporting directly to Komoto.

meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

C. *The Issues*

The primary unfair labor practice issues are whether or not:

1. In early October 1990, Respondent, through Gaylord Komoto, threatened employees with closure of the Hotel and discharge if employees selected the Union as their representative.

2. In November 1990, Respondent, through Estrelita Aceret, interrogated employees regarding their union membership, activities, and sympathies.

3. In November 1990, Respondent, through Mitsue Stone, interrogated employees regarding union membership, activities, and sympathies, and informed employees that fellow employees were discharged because of their union activities.

4. Between the middle of the end of March 1991, Respondent, through Ryan Leong, threatened to close the restaurant if the employees selected the union as their bargaining representative.

5. In early April 1991, Respondent, through Aceret, interrogated employees, and around the same time, Aceret and/or Stone insisted that employees swear that they would vote against union representation.

6. In July 1992, Respondent, through Komoto, conducted surveillance of employees' union activities.

7. On or about October 18, 1990, Respondent, through Yoshida, issued two written warnings to Gibbs, suspended Gibbs on or about October 20, 1990, placed Gibbs in on-call status, and discharged Gibbs on about October 26, 1990.

D. *The Alleged Violations of Section 8(a)(1) of the Act*

1.

Allegation: In early October 1990, Respondent, through Gaylord Komoto, threatened employees with closure of the Hotel and discharge if employees selected the Union as their representative.

The Evidence: Employee Gibbs testified credibly that in mid-October 1990, while in the storage room at the Hotel, he heard Yoshida tell Komoto that people were then in the Hotel's lobby passing out cards. According to Gibbs, that Komoto responded that he knew, and that he wasn't worried because the Hotel knew how to take care of it by closing for renovations and then reopening, putting everybody out of a job.

Komoto was not called to testify by Respondent.

However, Respondent asserts that I should find that the incident did not occur because Yoshida testified that he was not present when Komoto said that to him.

Conclusion: I draw a negative inference from Respondent's failure to have Komoto testify and deny that he made the remarks attributed to him by Gibbs. *General Teamsters Local 959 (Northland Maintenance)*, 248 NLRB 693 (1980).

That inference is sufficient to tilt the balance in favor of Gibbs testimony in this credibility conflict. I found that Yoshida presented a generally poor testimonial demeanor.

Accordingly, I find and conclude that Komoto made the remarks attributed to him by Gibbs.

I further find and conclude that those remarks were violative of Section 8(a)(1) of the Act, because they amounted to a threat to close the facility where employees were employed and, as a result, cause the loss of employees' jobs. *Somerset Welding & Steel*, 304 NLRB 32 (1991).

2.

Allegation: In November 1990, Respondent, through Estrelita Aceret, interrogated employees regarding their union membership, activities, and sympathies.

The Evidence: Narcissa Ocariza testified that a day after she went to the Union's headquarters to discuss the prospect of unionism, around Thanksgiving 1991, she met with two union officials on a street at the side of the Respondent's hotel. As she did so, she said, she noticed that her supervisor, Estrelita Asceret, was watching.

Ocariza testified that the next morning she was questioned by her supervisor during the morning's normal briefing of the housekeeping employees. As she testified, Asceret pointed to Ocariza and asked, ''Narcissa, who are those people?'' Ocariza responded, ''Oh, the Local 5 people?'' Asceret then said, ''Well, you like union. That's it.'' Then, so Ocariza testified, Asceret went on with the briefing.

Asceret testified in the case, but was not asked directly about this incident. Instead, she was asked whether, in any of her meetings with employees preceding the election she asked them whether anyone there supported the Union. She was also led to testify generally that she did not tell employees that if they supported the Union that they would lose their jobs.

Conclusion: Ocariza was a clearly credible witness, and I have no difficulty in crediting her version of the events she described over the generalized denials of Asceret (even as supported by the testimony of her assistant, Stone), elicited by leading questions.

However, I find, in agreement with the argument advanced by Respondent, that, under the standards set forth in *Rossmore House*, 269 NLRB 1176 (1984), the question posed by Asceret was simply too ambiguous to be found coercive. There was no showing that Asceret had knowledge of the identity of the officials of the Union when she asked the question. And, by all that appears, it was Ocariza, not Asceret, who linked the incident to the Union. Thus, when Asceret abandoned the subject and went on with the meeting with no rejoinder but her observation that, ''[w]ell, you like union. That's it.'' she seems in my opinion to have effectively blunted any effort to view the incident as having been coercive.

Accordingly, I find and conclude that the Act was not violated by the facts underlying this allegation.

3.

Allegation: In November 1990, Respondent, through Mitsue Stone, interrogated employees regarding union membership, activities, and sympathies, and threatened employees with discharge if they supported the Union.

The Evidence: The day following the incident mentioned in the preceding section, Mitsue Stone, Asceret's assistant, was in charge of conducting the morning briefing.

According to Ocariza's credited testimony Stone proceeded to ask her during the meeting why she liked unions. Ocariza also testified credibly that Stone also observed that

the Company didn't like unions, and that an employee had been fired because of the Union.

Employee Benita Calad testified in substantial agreement with Ocariza, and recalled that Stone asked who among the assembled employees liked unions. When no one answered, Calad testified, Stone went on to explain how a janitor named Augustin Villanueva had been fired over the Union.

Stone testified, and was led to generally deny that she ever threatened employees by telling them that if they voted for the union they would lose their jobs. She did not, however, deny the interrogation attributed to her by both Ocariza and Calad.[13] In fact, it was not until she was questioned by the Union's counsel about some meeting at which both she and Asceret were present (obviously not the meeting in question here), that she denied that she told employees that Villanueva was fired for having been involved with organizing for the Union.

Conclusion: In light of the fact that both Ocariza and Calad seemed to be highly credible when testifying, I have no difficulty in crediting their accounts of these events. This is especially true where, as here, there is no denial in the record. Contrary to the position argued by Respondent, the limited denial unintentionally elicited by counsel for the Union very late in Stone's testimony cannot be stretched to cover the interrogation and threat attributed to her by the credible testimonies of Ocariza and Calad.

As argued by counsel for the General Counsel, a direct question about why she liked a union, put to an employee in front of assembled employees as they were being briefed concerning their day's work assignments, and coupled with a warning that an employee who liked a union had been fired, cannot be viewed as anything but coercive.

I find and conclude that by these statements Respondent violated Section 8(a)(1) of the Act, by interrogating an employee concerning her union sympathies, and threatening employees that support for the union might well lead to the loss of their jobs.

4.

Allegation: Between the middle and the end of March 1991, Respondent, through Ryan Leong, threatened to close the restaurant if the employees selected the Union as their bargaining representative.

The Evidence: Russell Nakata, an employee working as a buffet runner, testified that during the period preceding the election, sometime within the period from March 11 to 22, he overheard a conversation between Supervisor Ryan Leong, and a cook, Nattie Agioli. According to Nakata, Leong said, ''[I]f the people vote for the union they're going to close the kitchen and everybody got to look for a job.''

As Respondent concedes on brief, Leong did not truly deny Nakata's testimony during his own testimony. Instead, so Respondent argues, I should understand Leong's testimony to be that he was merely responding to a question from an employee (one of several such questions he recalled having answered), and repeating what an employee had stated. Thus, since Nakata seemed not to have overheard the prelude to Leong's remarks, Respondent would have it that Leong was merely doing as he was privileged to do, i.e., truthfully advise (an) employee(s) of what another employee named Ken Chung had said concerning an earlier labor dispute concerning a different employer.

Conclusion: Upon my observation that Nakata was a generally credible witness, and the fact that Leong did not squarely meet or deny Nakata's testimony, I find and conclude that Leong did make the remarks attributed to him by Nakata. In so doing, he threatened that employees would lose their jobs if they supported the Union. If, as Respondent would have me speculate, he was simply quoting an employee, I find that the onus was upon him to make sure that his remarks were made in a way so as to avoid misinterpretation. So far as this record shows, assuming for the sake of argument that he was indeed merely quoting an employee, there was not even the slightest precaution taken by Leong to make sure that an employee overhearing what was said would reasonably understand the views expressed to have been, not Respondent's, but merely those of another employee.

I find and conclude, therefore, that Leong's statements were violative of Section 8(a)(1) of the Act, as threatening to put employees who supported the Union out of work.[14] Where such statements contain a ''prediction,'' as here, it is Respondent's burden to make sure that they are based upon objective fact, rather than the words of another employee. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

5.

Allegation: In early April 1991, Respondent, through Aceret, interrogated employees; and around the same time, Aceret and/or Stone insisted that employees swear that they would vote against union representation.

The Evidence: Ricardo Sobrevilla, an employee born in the Philippines who is fluent only in Tagalog, testified under subpoena from counsel for the General Counsel. He was examined, in large part, through an interpreter.

The gist of his interpreted testimony is to the effect that he recalls having signed an affidavit, or statement, for a union official, and that, while certain portions of that statement are true, other portions are not true, and were signed by him only in an effort to get away from the union official.

Several hours of effort went into attempting to sort out just how much Sobrevilla was having interpreted correctly for him, just how much Sobrevilla understood without interpretation, and how Sobrevilla's ability or willingness to recall and recount accurately may have been affected by having been awarded a trip to Japan by Respondent. Ultimately, I rejected counsel for the General Counsel's offer of his affidavit, or statement, as ''past recollection recorded'' or as useful for Sobrevilla's impeachment.

Yet, it is argued here by counsel for the General Counsel that I should accept his affidavit as substantive evidence, and credit it over both Sobrevilla's testimony elsewhere in this record, and the denial of Respondent's witnesses.

[13] Notwithstanding the concession of General Counsel on brief that she did.

[14] I have not utilized the testimony, including that in her affidavit, of employee Kim Butcher. Counsel for the General Counsel has sought to have such evidence be the basis for a finding that Leong made further threats. I decline to utilize that hearsay evidence as requested, noting that is not reliable in my opinion, and is mere surplusage in any event. I merely add in passing that I have no doubt that, as argued by counsel for the General Counsel, Butcher was not truthful when she denied her prior affidavit.

For the reasons stated at trial, I decline to do so. While I have no doubt that much of Sobrevilla's inability to understand was feigned, and that he clearly understood that his best interests lay in pleasing his employer, I also conclude that the record is simply inadequate to allow me to make findings of violative conduct based on an unsworn ''affidavit'' executed for the Union's representative, as to which the witness now professes either a lack of understanding, or complete disagreement. My reading of the record simply affirms my stated position at trial that Sobrevilla is utterly incredible as a witness, and will testify to please whoever may seem to offer the promise of benefiting him. But, I decline to credit anything he testified to except when it is against his own interests, or where it is clear that he has been surprised and simply does not understand which of several alternatives is the most beneficial to him.

However, Sobrevilla did testify to certain conduct of Respondent's supervisors that I find to be violative. My crediting of his testimony in this regard is based on the factors just stated.

Conclusion: Sobrevilla was quite clear in his testimony that, only a day or two preceding the election, he was called into Stone's office, and, while there, was told to put his hands on the bible and swear to vote no in the election. In light of the absolute clarity of his unwillingness to testify to anything contrary to his employer's interests, and the obvious failure of Sobrevilla to comprehend the import of this testimony, as distinguished from that which he gave when recanting his affidavit, I fully credit his testimony in this respect. I certainly give it much more weight than the conclusionary denial of Stone.

I find and conclude that by such conduct Respondent violated Section 8(a)(1) of the Act.

6.

Allegation: In July 1992, Respondent, through Komoto, conducted surveillance of employees' union activities.

The Evidence: Around July 22, 1992, the Union's representative, Ugale, went to the Hotel to hand out subpoenas, in preparation for this trial. He had two other representatives of the Union with him. He went into an alley at the side of the Hotel, known as Cartwright Road. The employee entrance is located there, and he wanted to meet the maids as they left the premises after finishing their work around 4 p.m.

Along the side of the Hotel, where the employees' entrance is located, is a sidewalk. All, or virtually all, of that sidewalk is located within Respondent's property line. Also located on Respondent's property, or so close thereto as to be virtually indistinguishable from it, on or just beside the sidewalk, stand a utility pole, a mail box, and a sign post which has a ''no parking'' sign on it.

There is where Ugale and his two companions met with employees Narcissa Ocariza and Rosita Antonio as they left work. As they stood on or just adjacent to the sidewalk, their attention was called to a nearby roof, which was part of the Hotel. They observed Gaylord Komoto, the Hotel's assistant general manager, standing there apparently engaged in photographing them. Evidently he used an instant camera, because at least two pictures were seen to come out of the camera.

Employee Antonio became frightened, covered her face, and walked to a location where Komoto could not observe her.

No one ever came to the union officials or the employees and told them that they were trespassing. Ugale claimed certainty that he and the others remained off of the Hotel's property.

Komoto was not called to testify about this matter. I infer therefrom, that his testimony would not have supported Respondent's argument advanced at trial, and on brief, that he was merely innocently engaged in documenting Respondent's claims that the Union trespassed upon Respondent's property. *General Teamsters Local 959*, supra.

Conclusion: Based on the credible and unrefuted testimony of Ugale and Ocariza, I find and conclude that Komoto did engage in photographing employees while they were engaged in the protected activity of meeting with officials of the Union, in preparation for the trial of this case. I further find and conclude that by such action, Respondent engaged in unlawful surveillance of employees' union activities, since, apart from the bare argument that the Union was trespassing upon Respondent's property, the record will support no finding to justify Respondent's actions. *John Ascuaga's Nugget*, 298 NLRB 524 (1990).

E. *The Alleged Violations of Section 8(a)(3) of the Act*[15]

Allegation: On or about October 18, 1990, Respondent, through Yoshida, issued two written warnings to employee John Gibbs, suspended Gibbs on or about October 20, 1990, placed Gibbs in on-call status, and discharged Gibbs on about October 26, 1990. The consolidated complaints allege that Respondent violated Section 8(a)(3) of the Act by each of these acts.

The Evidence: In support of her prima facie case, counsel for the General Counsel presented the testimony of the alleged discriminatee, John Gibbs, and a coworker, Patrick Shaw.

Gibbs testified that he first went to work for the Hotel about 9 years before. He worked there until his discharge on October 26, 1990. Gibbs was rehired in July 1991.

In October 1990 he was working there as a bellman, under the direct supervision of Blane Yoshida, the bell captain. His duties consisted of carrying luggage for guests of the Hotel, at a wage of $3.85 per hour. He'd also had experience in working behind the front desk while in Respondent's employ. While he worked uncertain hours, his shift generally lasted from around 9 a.m. to 2 p.m.

Gibbs credibly testified that both before and after Yoshida became a supervisor (and sometime even before Respondent purchased the Hotel), he and Yoshida had a number of conversations about the subject of unions. In each instance Gibbs recalled that he'd revealed his sympathies as being prounion. During one of those conversations, Yoshida recounted to Gibbs that Tomita had told him earlier that day that bellmen should not just stand around, but should be ''doing something.''

[15] Certain other allegations of violations of Sec. 8(a)(3) were withdrawn from the complaint during the trial by counsel for the General Counsel.

Gibbs testified that on about October 18, 1990, about 2:10 p.m., only a few short days after he had conversations with Yoshida in which he'd revealed his prounion sympathies, he received two written notices of verbal warning from Yoshida in the bell storage room, shortly after his arrival for work around 2 p.m.

One warning was issued for ''remaining behind the (front desk) for extended amount of time after given verbal and written instructions not to do so.'' The other was for ''leaving two (2) bell carts in lobby area unattended w/out bags after instructions not to.'' Both warnings were signed by Yoshida.

According to Gibbs, upon being handed the warnings, he replied to Yoshida, ''This is political. This has nothing to do with my work habits or whatever.'' When Yoshida asked what he meant, Gibbs stated that the warnings were about things that bellmen regularly did, without any discipline of any sort.

Gibbs testified that he routinely went behind the front desk to do such things as punch in, punch out, get coffee or water, Xerox documents, pick up lists, and the like. Additionally, he occasionally went there, and, if the occasion warranted it, he'd help answer the phones.

Gibbs, after initially refusing to do so, eventually signed receipt for both after receiving assurance that his doing so would not constitute an admission of guilt. He also acknowledged that the facts claimed by Yoshida to warrant the two warnings were essentially true, though he denied the accusations of Respondent arising therefrom, i.e., that he'd lounged or loitered behind the front desk, or left carts in the front lobby unattended in any different fashion than was routinely done. Finally, he testified credibly that he was never asked for his version of the facts, or any explanation he might have, before he was given the warnings.

Further, while Gibbs adhered to his view that bellmen routinely did the very things for which he was warned without discipline, he acknowledged that the Respondent had posted a rule against such actions by the bellmen, in the form of a large notice which had been posted in the bell storage room around August 15.

The notice warned that there would be no warning, but just an automatic pink slip, if anyone sat or lounged around the back office area.

However, so Gibbs testified, only a few days before receiving the warnings, he noted that, as he was behind the front desk to punch in on the timeclock as he arrived for work, everyone there was busy and that the phones were ringing. So, being experienced in such work, he simply undertook to answer four or five calls. Upon finishing, Komoto expressly told him that it was ''O.K.'' for him to be there, and that his help was appreciated.

Gibbs testified that he'd never before received any sort of discipline.[16] Gibbs also claimed that he'd never heard of any other bellman being written warnings before he came to work on October 18 and received two written warnings. He also claimed that he was ''above average'' as a bellman, even though he acknowledged that that fact didn't reflect itself in his receipt of tips from individual customers.

On the day that he was given the two warnings, Gibbs shift was to be from 2 p.m. to ''open,'' meaning that he was to have stayed as long as needed. However, around 6 p.m. he sought and received permission from Yoshimura, the front desk supervisor, to leave early, telling him that he was not feeling well.[17] Yoshimura told him he'd handle getting another bellman. As he was about to leave, though, Yoshimura asked him, ''By the way, what do you have? Stomach flu?''[18] Gibbs replied, ''Donald, if you want to know the truth, I think I have pink slip fever or flu.'' Yoshimura made no reply. Gibbs maintained that, whatever he told Yoshimura, he did, in fact, feel ill and sick to his stomach, and that his condition had been brought about by having received the two warnings.

The next day, while Gibbs was at home, not scheduled to work, he received a telephone call from Yoshida. Yoshida told him that he was being suspended for 4 days, because Yoshimura had told him that he'd walked off the job the night before. Gibbs rejoined, ''That's a lie.''[19]

Gibbs stayed home for the requisite 4 days, missing 3 days of pay.

Upon his return, he and Yoshida talked. Yoshida told him that he'd been changed to ''casual'' status, and could work only when called in, and had no more benefits. Gibbs claimed that despite his inquiries about why this was happening to him, he never was given a response. Yoshida told him to keep his nose clean, and, in time, everything would be all right.

Not unreasonably, Gibbs interpreted what had happened as a ''nice way of being fired.'' So, he talked to Yoshida about collecting unemployment compensation and a reference. Yoshida made a phone call to recommend Gibbs for other employment. In the end, however, Gibbs asked if Yoshida was sure that what he was doing was legal, and stated that he intended to find out.

Later, as Gibbs was cleaning out his locker, Yoshida came up and asked what he was doing. Gibbs explained that he was doing what was normal, i.e., taking all his things home. Yoshida responded that there was no need to do that, that he intended to put him on the schedule for the next week. However, he did not. In fact, though Respondent hired three

[16] Respondent attempted to prove the contrary, by showing that Gibbs had been warned some years earlier for having eaten some shrimp, and for having later having taken it upon himself to go into the Respondent's records and remove the warning. I regard the shrimp incident as so remote as to have no practical effect upon Gibbs record as an employee in this proceeding, and, in light of the clear difference of opinion between the parties concerning his right to remove the warning, as having no impact upon Gibbs' credibility in denying that he'd been previously disciplined.

[17] This finding is based on the credited testimony of Gibbs, which was not truly contradicted by that of Yoshimura. But, to the extent that Yoshimura could be said to have contradicted anything stated by either Gibbs or Shaw, I would discredit him. Yoshimura was so entirely incredible as to make anything he stated be viewed with suspicion.

[18] Based on the superior demeanor of Gibbs, I credit him entirely over Yoshimura, in any recitation the events of this encounter, specifically as to what Gibbs said, and as to Yoshimura's failure to say anything to Gibbs except to give him permission to leave.

[19] Regarding the question of whether or not Gibbs had received permission to leave from Yoshimura, Yoshida prevaricated, hesitated, and hedged his testimony. Eventually, after several tries, he settled on a version that had Yoshimura not telling Gibbs that he couldn't leave *for fear of being punched out*. Yoshida was clearly lying when he gave this testimony, which belatedly amended earlier versions of the same matter.

other bellmen in the interim, it was not until July 1991 that Gibbs was reemployed by Respondent.

Shaw, a highly credible witness, testified that the practice of leaving carts unattended in the Hotel's lobby was common, and he never heard of anyone being disciplined for having done so. Indeed, he observed that Yoshida had to have knowledge of that practice, because from time to time, Yoshida would ask him to remove a cart from the lobby, with no warning ensuing. Shaw also noted that he was, himself, granted permission to leave early from Yoshimura, and had received no discipline for having done so. Shaw also knew of the new notice posted in mid-August; but routinely thereafter, until Gibbs was ''placed on on-call status'' noted that Gibbs (like others, including himself) went behind the front desk, answering calls, getting coffee, or helping at the front desk.

Yoshimura testified that on October 18, while at work, a clerk came to him and told him that Gibbs was behind the front desk. So, he went to Gibbs and directed him to leave, which Gibbs did. The next morning Yoshimura told Yoshida that Gibbs had been behind the front desk, disturbing the work of the people there. Yoshimura incredibly testified that Gibbs was interrupting the work of others, despite his other testimony that he didn't know what Gibbs was doing there. Further, even more incredibly, Yoshimura testified that neither Gibbs nor other bellmen ever helped out behind the desk.

Yoshimura also denied that Gibbs asked him for permission to go home on October 18, or, in fact, that Gibbs had any conversation with him at all. He acknowledged that he reported to Yoshida that Gibbs had simply punched out and left, and denied that he'd ever given Gibbs explicit permission to leave. Indeed, while the record is not entirely clear on the point, he appeared to deny that anyone ever asked his permission to leave without him referring the person on to Yoshida or Kimoto.[20]

Yoshida's testimony contradicts that of Yoshimura, in that he recalled that Yoshimura told him that he asked Gibbs where he was going when he saw him punching out, and was by Gibbs about having pink slip flu.

Yoshida testified that that felt to him like a slap in the face, a feeling he later conveyed to Kimoto, when seeking authorization to discipline Gibbs. Yoshida went on to describe how he attempted to implement the rule posted on August 15 in the bellmens' room, forbidding them to lounge or sit behind the front desk He also described his efforts to get Gibbs to follow the rule, and the practice Gibbs had of doing so for awhile, only to lapse after a time.

Yoshida recounted that he reported the events to Kimoto, who told him that they should suspend Gibbs and place him on casual status.

Conclusions

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation.

First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision.

Second, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 399–403 (1983).

Counsel for the General Counsel must establish unlawful motive or union animus as part of her prima facie case. If the unlawful purpose is not present or implied, the employer's conduct does not violate the Act. *Abbey Island Park Manor*, 267 NLRB 163 (1983); *Howard Johnson Co*., 209 NLRB 1122 (1974). The General Counsel has produced no direct evidence that Respondent harbored any animus against the union members. However, direct evidence of union animus is not necessary to support a finding of discrimination. The motive may be inferred from the totality of the circumstances proved. *Fluor Daniel, Inc*., 311 NLRB 498 (1993); *Associacion Hospital del Maestro*, 291 NLRB 198, 204 (1988).

In my opinion, counsel for the General Counsel has succeeded in making out a prima facie case of disparate treatment of Gibbs. That is precisely what Counsel for the General Counsel has shown was done in this case. The evidence supplied by Gibbs and Shaw shows that Respondent has engaged in disparate treatment of Gibbs by disciplining him for breaking rules which are commonly broken at the facility, and which have long been widely known to be broken by both Respondent's employees.

In the process, she has supplied the element of animus necessary to complete her prima facie case of a violation of Section 8(a)(3) of the Act.

Contrary to the position of Respondent, since Gibbs was the only employee ever disciplined for either leaving carts in the lobby, being behind the front desk, or for developing ''pink slip'' flu, I find and conclude that the sudden decline in the level of tolerance for longstanding practices of employees, coinciding with the beginning of a campaign by the Union at the Respondent's facility, and Gibbs' own expressions of sympathy for the Union, gives rise to the inference that Respondent intended to discriminate against Gibbs for harboring the union sympathies he'd announced to Yoshida.

Thus, based on my findings thus far, I find and conclude that Gibbs' two warnings were based on discriminatory considerations. I also find that Respondent has failed to overcome counsel for the General Counsel's prima facie case with respect to these two warnings. Indeed, based on the credible testimonies of both Gibbs and Shaw, I find that the practice of going behind the front desk or of leaving carts unattended in the lobby was widely engaged in and would have resulted in no discipline at all absent Gibbs' union sympathies. Indeed, I find that their credible evidence establishes that the Respondent's stated reasons for discipline were false.

As such, I find that they masked a discriminatory intent. *All Brite Window Cleaning*, 235 NLRB 596, 602 (1977).

While it does not automatically follow that all of Respondent's later actions were unlawful, such evidence raises valid suspicions. For, if Respondent thereafter merely waited for

[20] Despite Yoshida's belated recollection that Yoshimura had not argued with Gibbs about punching out and leaving because Yoshimura was afraid of being punched out, *even Yoshimura never testified that he'd felt frightened, or apprehensive that, if he attempted to stop Gibbs from leaving, he'd get ''punched out.''*

some infraction of the Respondent's rules to serve as an excuse to discipline Gibbs, and, if in doing so, Respondent seized upon conduct by Gibbs which it had countenanced by others, then Respondent's conduct should be deemed illegal.

Only if it happened that Gibbs gave Respondent a valid opportunity to employ discipline in order to enforce good order among its bellmen, without resort to the discriminatory warnings issued to him, may Respondent validly assert that as a defense to the General Counsel's prima facie case.

This is especially true where the action taken against the employee is based on a report by a supervisor, such as Yoshimura,[21] who was discriminatorily motivated in making the report, in the sense that he knew full well when reporting to Yoshida Gibbs had not been observed doing anything wrong. *Bechtel Corp*., 195 NLRB 1013, 1020 (1972).

Respondent contends that the suspension of Gibbs, and his conversion to ''on call'' status, was occasioned only by his supervisor getting a ''belly full'' of Gibbs, and because Gibbs falsely claimed to have become sick at work (pink slip flu), as a means of protesting having received warning notices, and because Gibbs left the job without permission.

Under normal circumstances, Respondent would find this argument sufficient to carry the day in refuting counsel for the General Counsel's prima facie case. For, even though Gibbs was, in fact, upset at having been unlawfully disciplined, I can find no warrant for his developing pink slip flu, and using that as an excuse to leave the premises without permission. Had he done so, I would find that he did so at his peril, and would not find that the suspension which followed the next day, or the de facto discharge he suffered several days later were unlawful.

But, that's not what happened here. Gibbs did not leave without permission. He specifically got permission from Yoshimura, a man who Respondent admitted at trial was vested with authority to grant permission. And Yoshimura gave that permission with full knowledge the Gibbs illness was based upon pink slip flu. There is absolutely no credible support in this record for the view that Yoshimura's silence following his grant of permission to Gibbs to leave, and Gibbs followup statement about being ''straight'' and letting him know that he had pink slip flu, was based on anything but what he told Gibbs at the time. And what he later confirmed on the phone to Yoshida, i.e., he could handle things there by himself. I base this finding specifically upon the relative credibility of Gibbs and Yoshimura; I have no doubt at all that Gibbs is by far the more credible.

Thus, it simply is not open to question that Gibbs' earlier discipline, which was itself discriminatory, led directly to his leaving the Hotel. Nor can it be argued from any credible evidence that he left without the full and express permission of an authorized agent of the Hotel to do so. Thus, these findings leave the Respondent with no refutation of the General Counsel's prima facie case, described above.

Accordingly, I find and conclude that by issuing warnings to Gibbs and by suspending Gibbs, and by converting him to ''on call'' status, with attendant loss of benefits, all as described in the complaint, Respondent has violated Section 8(a)(3) of the Act.

[21] Whose testimonial demeanor marked him as an utterly incredible witness.

IV. REPORT AND RECOMMENDATIONS ON OBJECTIONS AND CHALLENGED BALLOTS

At the election mentioned above[22] there were, according to the tally of ballots, approximately 107 eligible voters. Of them, 34 cast ballots for and 24 cast ballots against the Petitioner/Union, for a total of 58 valid votes counted. Additionally, while there were no void ballots, there were 39 challenged ballots. Thus, there were a total of 97 valid votes counted plus challenged ballots.

The Regional Director found in his report that the 39 challenged ballots raised substantial and material factual issues which were best resolved on the basis of a hearing. Accordingly, he consolidated them for hearing at the same time I heard the issues raised by the complaints alleging the commission of unfair labor practices by the Respondent.

On April 16, 1991, the Petitioner filed timely objections to the election, alleging inter alia that the Employer engaged in unlawful interrogation, threats, surveillance, and granting of benefits to employees, and that the Employer reclassified employees as ''casuals'' based on those employees' union activities. In his report the Regional Director found that the allegations in the Petitioner's objections were related to the allegations raised in the outstanding complaints and notices of hearing, and that they raised substantial and material issues which could best be resolved by hearing. Accordingly, he consolidated them for hearing before me.

On April 17, 1991, the Employer filed timely objections to the election, alleging inter alia that the Petitioner granted financial inducements to procure votes, engaged in unlawful electioneering, and otherwise interfered with laboratory election conditions. The Regional Director's report recommended overruling the Employer's Objection 5, which raised issues concerning the integrity of the Board's election process based on the allegation that the ballot box was not properly sealed. The Regional Director's report determined that the remaining objections filed by the Employer raised substantial factual issues which were best resolved on the basis of sworn testimony. Accordingly, he consolidated them for hearing before me at the same time I heard the allegations of unfair labor practices. However, the Board, when dealing with the Respondent's exception to the Regional Director's report, found that Respondent's Objection 5 should also be consolidated for hearing with the remaining objections, challenges and unfair labor practice allegations.

A. *The Challenged Ballots*

I turn now to the resolution of challenges to the ballots of 39 people who attempted to vote in the election, but whose ballots were challenged. In these resolutions, I bear in mind

[22] The stipulated unit is described as follows:

> All full-time and regular part-time employees of the (Respondent) including all cooks, bakers, pantry employees, kitchen utility employees, cashiers, hosts/hostesses, servers, door persons, clerks, PBX operators, bell staff, maintenance staff, painters, utility staff, yard staff, room maids, laundry employees, and guest service employees employed by the (Respondent) at its 150 Kapahulu Street, Waikiki, Hawaii location but excluding all managerial employees, professional employees, confidential employees, guards and supervisors as defined in the Act.

Further, the parties stipulated that the kitchen supervisor, day, lead cooks, and head waitresses would vote subject to challenge.

that it is the party seeking to exclude an individual from voting for a collective-bargaining representative which has the burden of establishing that an individual is, in fact, ineligible to vote. *Golden Fan Inn*, 281 NLRB 226, 229–230 fn. 12 (1986).

1. Ballots challenged by the Board agent

The ballots of 9 voters were challenged by the Board agent conducting the election on the ground that their names were not on the list of eligible voters furnished by the Employer. Their names are Saturnina Agonoy, Shareen Bailey, Walfredo Cardenas, Kay Costa, Jay Dolor, Phyllis Hisatake, Simeon Kailihiwa, Tina Low,[23] and Katherine Yonamine.

One of these, Kay Costa, was initially alleged to be a discriminatee, but the allegations relative to her discrimination were withdrawn.

Counsel for the Board took no position regarding the remainder of those challenged by the Board agent, except to say that if they were, indeed, inadvertently left off of the voting list of those eligible to vote, then they should be allowed to vote if they share a community of interest and worked the requisite number of hours.

So far as appears from its brief, the Petitioner apparently argues that all nine should be deemed eligible voters. But, its brief specifically mentions only Kailihiwa, Bailey, and Cardenas by name.

The Employer specifically concedes that Dolor and Yonamine should be found to be eligible, but disputes that Costa, who was laid off prior to the election, remained eligible following her layoff.

Accordingly, based on the fact that it appears that there is no dispute regarding eight of the ballots, I find that Saturnina Agonoy, Shareen Bailey, Walfredo Cardenas, Jay Dolor, Phyllis Hisatake, Simeon Kailihiwa, Tina Low, and Katherine Yonamine were inadvertently left off the eligibility list. The challenges to their ballots should be overruled, and their ballots should be opened and counted.

Costa, who had worked in the food and beverage department as a cashier and hostess, testified credibly that when she was initially laid off in February 1991, she was assured that the layoff was temporary, and was occasioned only to the downturn in business brought about by the Gulf War. However, several days later, apparently on February 15, she happened to again be at the Hotel, and an issue arose about whether or not her layoff was temporary or permanent. She credibly testified that she persisted in asserting her demand for an answer to the question, until she was finally assured by Gaylord Komoto, the Hotel's assistant manager, that the issue arose only because of a typographical error on the termination form. He had her initial its correction, to show that the layoff was due only to a reduction in hours. It was not stated, nor did she think to inquire about, just how much her hours were being reduced. In fact, she credibly testified that following this, she periodically called the Hotel to check whether the Hotel had work for her. While Respondent does not explicitly concede this point, it does not dispute it.

Therefore, since it clearly appears that Costa was within the group eligible to vote, and since, in the end, her layoff was clearly communicated to her as of a temporary nature, i.e., a ''reduction in hours'' (despite her failure to understand that the ''reduction'' might be to zero hours), she retained her community of interests with the other employees. Thus, I find no warrant for finding that the Employer has sustained its burden of establishing that Costa no longer had a community interest with those employees eligible to vote in the election. Accordingly, I find that the challenge to her ballot should be overruled, and her ballot should be opened and counted.

2. Ballots challenged by the Petitioner

The three ballots of George Fukunaga, Yoshio Hanamoto, and Judy Ann Rutkiewicz were challenged by the Petitioner on the ground that they were supervisors within the meaning of the Act. However, the challenge to the ballot of Yoshio Hanamoto was withdrawn during the trial. Accordingly, it is found that the challenge to the ballot of Yoshio Hanamoto should be overruled, and his ballot should be opened and counted.

The nine ballots of Frank Hara, Chizuko Kutaka, Janet Moku, June Muraoka, Patrick Shaw, Faye Takara, Shane Tokunaga, Satusuki Toya, and June Ushijuma were challenged by the Petitioner on the ground that they were casual employees. At trial, the Petitioner's challenges to six of these ballots were withdrawn. Thus, the ballots of Frank Hara, Janet Moku, June Muraoka, Faye Takara, Satusuki Toya, and June Ushijuma are no longer in issue. Accordingly, their six ballots should be opened and counted.

Inasmuch as the record shows that Chizuko Kutaka worked only sporadically for the Employer, and that in more than half the pay periods from December 1990 up to the election he worked no hours at all, I find that Petitioner has met its burden of showing that Kutaka no longer had a community of interest with those employees eligible to vote in the election, and that the challenge to his ballot should be sustained. Accordingly, his ballot should not be opened and counted.

The ballot of Patrick Shaw was challenged by the Petitioner, as a casual employee. In its brief, the Employer states that it agrees with the Union about this ballot. Accordingly, it is found that the challenge to the ballot of Patrick Shaw shall be sustained, and his ballot should not be opened and counted.

At trial, the Union stated that it wished to withdraw from its previous agreement that Shane Tokunaga, the son of Merle Tokunaga, the Hotel's director of sales and administrative assistant to the executive general manager. The stated basis is that he is related to a member of management.

There is, however, no evidence that Tokunaga enjoys any special privileges or status as a result of his relationship with his mother. Absent such evidence, the mere fact of his relationship is insufficient to meet Petitioner's burden of showing that he should be excluded. *Blue Star Ready-Mix Concrete Corp*., 305 NLRB 429, 430 (1991). I find therefore that the challenge to his ballot should be overruled and that his ballot should be opened and counted.

[23] While there was brief mention of Tina Low during testimony given during the second week of trial, there is clearly not enough evidence to warrant her exclusion as a voter. In fact, it appears that there is probably no dispute that she is an eligible voter. Thus, I find that the challenge to her ballot should be overruled, and that her ballot should be opened and counted.

The ballot of Ken Tomita was challenged by Petitioner because he wae alleged to be a casual employee. Additionally, it was asserted by Petitioner that Tomita was a relative of management, and by virtue thereof enjoyed special status and privileges. Gibbs testified that Tomita is the nephew of the general manager, and, unlike other employees, is allowed to park on the Hotel's ramp.

The Employer claims that Tomita was a nephew of the general manager, Sigeru Tomita. However, it also asserts that the elder Tomita had no equity in the Hotel, and that the younger Tomita's status in the Bell department had no special status attached to it. Further, the evidence adduced in support of the claim that Tomita enjoyed special status or privileges, such as being allowed to park on the Hotel's ramp, all related to a period after the election, and in any event is contradicted by credible evidence from the Employer to the effect that Tomita was not accorded special privileges in being rented a room at the Hotel. In fact, a number of employees rented rooms at the Hotel, apparently on the same basis as Tomita. In light of this, I find that Petitoner has failed to meet its burden of establishing that Tomita should be excluded. See generally *Blue Star Ready-Mix Concrete Corp*., ibid. I am not persuaded by the cases cited by Petitoner on brief. *Terraillon Corp*., 280 NLRB 366 (1986), seems to me to be precisely contrary to Petitoner's postion, by its adherence to the ''special status'' text for exclusion. And, I confess my inability to see the relevance of *Jennings & Webb, Inc*., 288 NLRB 682 (1988), to this issue.

I find therefore that the challenge to the ballot of Tomita should be overruled and that his ballot should be opened and counted.

George Fukunaga and Judy Ann Rutkiewicz were challenged by the Petitioner as supervisors, however, the Petitioner/Union makes no argument regarding these people in its brief. If is the burden of the party seeking to establish the supervisory status to show the existence of that status.

Here, the evidence, essentially the testimony of Gibbs, shows only that Fukunaga has a tile as director of guest services, that he wears a shirt and tie rather than a uniform, thaat he has a desk in the lobby, and once expressed regret at having had to fire an employee named Shoko for failing to have a green card. Also according to Gibbs, Fukunaga interviewed employees Cila Sonoda and Cheryl Lynn when when they were hired. However, it appears that Gibbs was speaking of events which occurred, if at all, months after the election. Fukunaga speaks Japanese, and could well have served as a translator. His job is to book tours for guests, just as his ''assistants'' do. Gibbs admittedly didn't know if Fukunaga made a recommendation after the alleged interview. The testimony of Merle Tokunaga on these points was inconclusive.

The Union introduced documentary evidence at trial regarding the room rented to Fukunaga by Respondent at the Hotel. However, I note that the document is dated months after the election herein. Accordingly, I deem it unpersuasive as to any status he occupied prior to or at the time of the election. Additionally, The payroll change authorization, showing his status as director of guest services, is dated well after the date of the election. The several papers relating to relevant time periods, or which are undated, are simply too ambiguous to carry the burden of the Charging Party.

Fukunaga's own testimony shows only that he provided guidance to a fellow employee, long after the date of the election. That he was asked to interview that employee, albeit long after the election, when she was hired to determine how well she spoke Japanese, or that he performs certain administrative functions in connection with his work, such as making out a ''schedule,'' does not demonstrate the sort of independent judgment needed to demonstrate status as a supervisor. *Blue Star Ready Mix Concrete Corp*., id.

Accordingly, I conclude that the Petitioner has failed in its burden of showing supervisory status of Fukunaga. *Tucson Gas & Electric*, 241 NLRB 181 (1979). The Petitioner's challenge to the ballot of Fukunaga should be overruled, and that his ballot should be opened and counted.

Regarding Rutkiewicz, the testimony of Merle Tokunaga was inconclusive. However, according to the credible testimony of Joyce Tatemichi, Rutkiewicz was merely the reservationist for an entertainer who performed at the Hotel, Frank Delima, and had no supervisory status. Accordingly, I find that the Petitioner has failed to meet its burden of establishing that Rutkiewicz lacks the requisite community of interest to be allowed to vote in the election. *Tucson Gas & Electric*, id. Accordingly, the challenge to her ballot should be overruled, and her ballot should be opened and counted.

3. Ballots challenged by the Employer

The 17 ballots of Carodad Aloncel, Federico Bagasoni, Lynn Bautista, Ninyo Butcher, Teodora Cabanizas, Benita Calad, Helene Ishizaki, Wilton Kanahele, Peleaise Lotaki, Narcissa Ocariza, Estrelita Palafox, Verona Sales, Jose Santiago, Warlita Sinco, Sofia Tongotea, Amelia Uipi, and Ming Man Zhang were challenged by the Employer.

The basis of the challenge is the fact that on March 22, 1991, the Respondent/Employer sent each of them a letter, stating as follows:

> For your information and records, you are reclassified from part-time to casual status as of March 22, 1991. In accordance with our handbook, ''Should an employee change from regular full-time or regular part-time to a casual status, he will be paid for all current and accumulated vacation time due and will forfeit all sick pay, medical, dental, group life insurance and other benefits commencing on the day of the change in status.'' If you wish to continue medical and dental benefits by paying for the premium yourself, please see attached notice.
>
> We regret that economic problems make this action necessary.

Thus, all ballots of employees challenged by the Employer were challenged on the basis that they were mere casual, on-call employees. The Petitioner counters the Employer's claim by asserting that the Employer illegally changed the status of all such employees during the period following the agreement upon a stipulated election, and further, so the Petitioner claims, these employees, in any event, still are shown by the evidence to have occupied the status of regular, part-time employees entitled to vote in the election.

The Employer asserts that its change in the status of employees was justified by economic conditions in the world, caused by the Gulf War's adverse effect upon tourism. That the war, in fact, had an adverse effect was not seriously challenged, and is taken by me to be true.

The Employer further asserts that, because of the change in the status of the affected employees, they no longer enjoyed all the fringe benefits they'd previously enjoyed, and which were still enjoyed by regular employees, such as health insurance.

The testimony of Joyce Tatemichi was to the general effect that she prepared the *Excelsior* list for this election. There is no dispute that the *Excelsior* list did include the names of the 17 employees challenged by the Employer. However, she also testified that she typed out a letter which was sent to the 17 employees challenged, notifying them of the change in their status. Additionally, she served as the Employer's observer at the election, and personally challenged each of the 17 ballots in question.

The Board has rather recently stated that,

> [i]n determining whether or not on-call employees should be included in the bargaining unit, the ''Board considers whether the employees perform unit work, and those employees' regularity of employment. . . . [R]egularity can be satisfied when an employee has worked a substantial number of hours within the period of employment prior to the eligibility date. . . . Under the Board's long-standing and most widely used test for voting eligibility an on-call employee is found to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages 4 or more hours of work per week in the last quarter prior to the eligibility date. . . . Although no single eligibility formula must be used in all cases, the *Davison-Paxon* formula [cited herein] . . . is the one most frequently used, absent a showing of special circumstances. [*Trump Taj Mahal Casino*, 306 NLRB 294 at 295 (1992).]

Here, the records in evidence show that each of the 17 affected employees met the standard set forth in *Trump*, id., i.e., working at least 4 hours per week in the last quarter prior to the eligibility date.

The Employer argues that I should apply a different standard. Relying on older cases such as *Buckley Southland Oil*, 210 NLRB 1060 (1974), and *Inter Continental Hotels Corp. (Hawaii)*, 237 NLRB 906 (1978), the Employer argues for a standard of a ''meeting of the minds,'' at the time of the execution of the election stipulation. However, as I read each of those cases, they rely upon special facts quite peculiar to their own fact situations to reach the results which they reached.

In *Buckley*, supra, the parties had specifically discussed the inclusion or exclusion issue for seasonal employees, and had, as a result formulated a unit description which included only *permanent* employees; further, the parties had clearly agreed to postpone the resolution of any questions which arose from challenges in this area, because they specifically agreed prior to the election that an employee's ballot would not be counted pending postelection procedures. Thus, the case is simply inapposite to the issue here.

In *Inter Continental*, supra, the dispute did not revolve, as it does here, around facts and circumstances which happened after the date when the parties executed the stipulation agreement. I regard that distinction as important, because in this case I am not called on to determine whether or not the parties had a meeting of the minds regarding circumstances extant at the time of the stipulation's execution. Here, the Employer has not even asserted that any failure of the parties minds to meet occurred until it changed the circumstances following the execution of the stipulation.

Therefore, I am not persuaded that the cases cited by the Employer should cause me to exclude from the balloting employees who are shown by the record to have had their status changed only after the stipulation was executed and approved. Further, the evidence taken as a whole shows that all or nearly all these employees were, in fact, still employed by the Employer right up through the time of the hearing herein. Though their fringe benefits had been changed by their change in status seems not to me to lead to a different result. Their community of interest remained unchanged if one is guided by the facts which are apparent from this record, i.e., that the affected employees continued to work substantial numbers of hours in the very same jobs they'd previously worked in, and eventually were, for the most part, restored to their old status. Compare, *Pat's Blue Ribbons & Trophies*, 286 NLRB 918 (1987).

I conclude, therefore, that the Employer's evidence has not shown that the *Trump* standard of regularity set forth above is inappropriate, or that there are any ''special circumstances'' warranting the application of a different standard.

In applying this standard to the ballots challenged by the Employer on the basis that they were casual employees, I find and conclude that the evidence fails to support the Employer's contentions, and that, instead, supports my finding that all such employees have been shown to meet the standard set forth above in *Trump*. Accordingly, I recommend that all such employees ballots be found valid, and that they should be opened and counted.

4. Summary of conclusions regarding challenged ballots

All of the nine ballots challenged by the Board should be opened and counted.

All of the 13 ballots challenged by the Petitioner should be opened and counted, except for the ballots of Shaw and Kutaka, whose challenges have been sustained.

All of the 17 ballots challenged by the Employer should be opened and counted.

The Regional Director, following the opening of the ballots set forth above (and as specifically named in Appendix B), should issue a revised tally of ballots and an appropriate certification.

B. *The Objections of the Employer*

The objections of the Employer allege, and are resolved, as follows:

1. The Petitioner, which is in control of substantial assets, and which has established or is establishing employee welfare and benefit plans for such purposes, by and through its agent, offered and granted specific substantial financial inducements to voters and others in order to obtain their support and procure votes in the election. These actions, which amount to buying votes, included:

> a. Providing valuable new benefits to voters on the condition that they voted ''yes'' for Petitioner. This included a promise of payment by Petitioner for post-

retirement medical and other benefits irrespective of the results of bargaining, vesting or years of service. Over 50 employees of the employer are over 50 years of age and this benefit played a substantial role in Petitioner's campaign.

b. Promising employees substantial, specified and unspecified benefits for organizing the employer to be provided by Unity Foundation, an affiliate of or plan controlled by Petitioner, or an *alter ego* of Petitioner. Because of the size and publicity of the Unity House fund, employees would be likely to believe that it is solely within the power of Petitioner or its officers to grant o[r] withhold the promised benefit.

c. Providing valuable gifts, including printed T-shirts, to employees who agreed to support and campaign for the union on the day of the election.

Discussion: The Employer placed into evidence documents showing that the Union here has an affiliation with an organization known as Unity House, and that Unity House has some of the same officers as the Union. Additionally, it was shown that the Union and Unity House have substantial assets.

From this, the Employer argues that the Union engaged in impermissible electioneering by ''buying'' votes through such tactics as giving away cars and appliances at its annual picnic, by giving employees T-shirts bearing the Union's logo or other identification of allegiance or support, and by virtue of providing for pension, dental, health, vision, and life insurance plans for its members. The Employer argues that such actions have a particularly pernicious effect upon its employees, who are said to be largely over the age of 50.

In effect, the Employer's brief appears to concede that current law permits the conduct of the Union, and to argue that the law should be changed.

There is no direct evidence of any conduct by the Union which could be said to be unlawful in this connection, such as the granting of benefits to employees during the critical period preceding the election. *Mailing Services, Inc*., 293 NLRB 565 (1989). Instead, it appears to me from all that has been presented, that all the Union did was to publish existing incidents of union membership or representation, as is permitted. *Mailing Services*, id.; *Dart Container of California*, 277 NLRB 1369 (1985).

Accordingly, I recommend that this objection be overruled.

2. Petitioner interfered with the laboratory conditions necessary for the holding of a free and fair election by inducing, encouraging, and authorizing supervisors of the Employer to campaign on behalf of the Union and to solicit authorizations cards and votes on behalf of the Petitioner, and to influence employees with Petitioner's promises of retirement and medical benefits on the condition that they voted ''yes'' in the election.

Discussion: The Employer presented no evidence to support this objection, and none was put forward by any other party. Nor did it argue the matter in its brief. Accordingly, I deem it to have been abandoned, and recommend that it be overruled.

3. The Petitioner engaged in campaigning in the voting area by having its election observer wear a T-shirt with Petitioner's insignia. Not only did this remind voters of the Union's valued gifts given to obtain support in the election, but it further gave the impression, due to the closeness of the observer's large union logo to the Board agent, that the Board was condoning prounion electioneering the voting area.

Discussion: The Employer presented virtually no evidence to support this objection, and none was put forward by any other party, except for the bare fact that one of the observers at the election wore a T-shirt which bore the Union's logo.

Such conduct is clearly permitted by existing Board standards, since there is no reasonable basis for any potential voter to conclude that the observer is in charge of conducting the election. *Bonanza Aluminum Corp*., 300 NLRB 64 (1990).

Nor did the Employer argue this matter in its brief. Accordingly, I deem it to have been abandoned, and recommend that it be overruled.

4. Petitioner, through an authorized and vocal agent, engaged in vociferous and boisterous campaigning in the voting area while the polls were open. Despite the efforts of the Board agent to terminate that misconduct, it had the effect of destroying the laboratory conditions for some 15 voters present.

Discussion: The Employer presented virtually no evidence to support this objection, and none was put forward by any other party. The testimony of Joyce Tatemichi to the general effect that there was some noise for brief periods is insufficient to even raise a question concerning the proper conduct of the election. Indeed, the clear tenor of Tatemichi's testimony is to the effect that the Board agent who conducted the election took prompt and effective action (i.e., scolding employees), in the few and brief periods during the election's conduct when any employee started to interfere with the proper conduct of the election. Nor did the Employer argue this matter in its brief. Accordingly, I deem it to have been abandoned and recommend that it be overruled.

5. In the conduct of the election, the integrity of the Board's election processes was not sufficiently safeguarded because the ballot box was not fully sealed, and it was removed from the voting area for several hours in a ''split session'' of voting. During the election the ballot box was placed *behind* the election observers so that they could not observe whether voters were placing their ballots in the box before exiting. Under all the surrounding facts and circumstances, no observer could know what ballots were eventually counted or certify to the security of the ballot box. (Employer makes no accusation hereby that any Board agent placed ballots in the box.)

Discussion: This objection led to the presentation of much evidence in this trial, including the extensive testimony of Thomas W. Cestare, the Board's officer-in-charge of Subregion 37, the Honolulu office of the Board, as well as the person who conducted the election. While I found the testimony both interesting and credible, I see no need to detail it here. For, as is made clear by the Employer's brief, it has no quarrel with anything said by Cestare and does not challenge his credibility. Further, the Employer makes no claim that anything untoward actually occurred in this case. It's claim is that proper procedures weren't followed, and that some improper conduct, such as putting false ballots into the ballot box, or removing them, could have occurred as a result of the failure to follow proper procedures.

Regarding the issue of the ballot box being placed behind the observers, or the Board agent, the testimony of Joyce Tatemichi and Cestare showed clearly that the box was at no time behind the observers. At worst, it was at their side, at the limit of their range of peripheral vision, and entirely visible with even a slight turn of the head. There is simply no credible evidence that the box was ever out of the absolute control of the observers and the Board agent during the conduct of the election. As admitted by the Employer's observer at the election, Tatemichi, she could see the box about 8–10 feet from her without even the necessity of turning her body.

The balloting in this election took place during two sessions. The box was shown to all the observers before the first session, and was then assembled by Cestare by taping its ends into place. The box, an ordinary cardboard box, is of the sort customarily used for the conduct of elections by the Board. It requires that it's ends be taped shut, and that a slit be cut in it in order to allow ballots to be inserted.

In this case, it was sealed with tape following the first balloting session and taken by Cestare with him. Then, upon his arrival back at the Hotel to conduct the second session of balloting, each observer was given the opportunity to view the box for evidence of tampering, and to note that the tape which had sealed it, together with their initials, was still in place to everyone's satisfaction. Following this inspection, each observer saw it unsealed, and then used to collect the ballots cast during the second session. At the end of the second session, the box was opened in the presence of the observers and the ballots were counted. Following the counting, the observers signed certifications as to the fairness of the election.

The gist of the remainder of the evidence is that Cestare sealed the ballot box by placing masking tape along its edges. The Employer's objection goes to Cestare's admitted failure to put masking tape along the *entire* edge of each flap of the box. Thus, so it is claimed, Cestare failed to follow instructions that the ballot box by ''closed and *securely* sealed'' and that it be done with ''extreme care.''

The Employer does not quarrel with the observation of Cestare that each of the ballots was accounted for, i.e., the precise number of ballots were found in the box when the ballots were counted as he'd passed out to voters as they came through the line and had their names checked off by the observers.

In short, there is absolutely no evidence that any ballots were cast improperly, and there is absolutely no evidence that any ballot was taken from the box, and therefore improperly not counted.

Instead, the entire thrust of this objection is that there could have been ballots put into the box or removed from the box because of the failure to put tape along the *entire* edge of each flap that was sealed.

In my opinion the objection is without merit. The box was ''sealed'' within the meaning of any reasonable interpretation. While I must concede that it may have been *theoretically possible* for someone, given enormous time without interruption, to have worked and pushed and manipulated a ballot into the areas where no tape was, it is so obviously difficult as to be well near impossible as a practical matter.

As can be seen by observing the box, there is simply no *opening*. There is merely a line where two pieces of cardboard join tightly, and in my opinion, in doing so, form a ''seal.''

The ''appearance of impropriety'' which the Employer says should be controlling in this case is, to me, so minuscule and unrealistic as to be virtually invisible. To set aside elections based on such trifles as this would effectively disenfranchise many voters.

I recommend that this objection be overruled.

6. The parties and the board failed to resolve, through preelection hearing or otherwise, a number of challenged ballots known in advance of the election to exceed 25 percent of the expected turnout, creating an atmosphere which precluded a fair election. This number of expected challenges warranted revocation of the agreement for certification upon consent election, because the Regional Office was well aware of the high number of election votes to be challenged. Failure to call off the election despite contrary policy set forth in the NLRB field operations manual was arbitrary and tends to destroy the conditions necessary for a proper election.

Discussion: I deem this to be an administrative matter, subject to the Board's control through the Regional Director. I see no warrant for me to attempt to apply the internal instructions and guidelines of the Board or the General Counsel to the Regional Director. Accordingly, I recommend that this objection be overruled.

7. The Petitioner, through its observer and agent, engaged in selective challenges of employees based solely on their expected vote or prior Local 5 affiliation, so as to coerce and intimidate these voters.

Discussion: The Employer presented no evidence to support this objection, and none was put forward by any other party. Nor did it argue the matter in its brief. Accordingly, I deem it to have been abandoned, and recommend that it be overruled.

8. Petitioner, through its observer, engaged in campaigning for Petitioner during the period between the opening of the polls and the count of the ballots in violation of the Board's election standards.

Discussion: The Employer presented no evidence to support this objection, and none was put forward by any other party. Nor did it argue the matter in its brief. Accordingly, I deem it to have been abandoned and recommend that it be overruled.

9. The Petitioner trespassed on employer's premises and engaged in unlawful recognitional picketing on the day of the election.

Discussion: The Employer presented no evidence to support this objection, and none was put forward by any other party. Nor did it argue the matter in its brief. Accordingly, I deem it to have been abandoned and recommend that it be overruled.

10. By these and other acts of interference, restraint, and/or coercion, the Petitioner and its agents destroyed the laboratory conditions necessary for the conduct of a free and fair election.

Discussion: This ''catch-all'' objection had no evidence presented to support it, and was not argued in the Employer's brief. Accordingly, I deem it to have been abandoned and recommend that it be overruled.

Having considered each of the Employer's objections to conduct affecting results of election, and having found no

merit in any of them, it is recommended that they be overruled in their entirety.

C. *The Objections of the Petitioner*

The objections of the Petitioner allege as follows:

1. The Employer, by its agents, interrogated employees as to their union activity.

2. The Employer, by its agents, threatened employees with discharge for engaging in union activity by threatening to close the operation.

3. The Employer, by it agents, engaged in surveillance of employees' union activity.

4. The Employer, by its agents, offered and granted out-of-the-ordinary benefits before the vote in an effort to influence the vote.

5. The Employer, by its agents, failed and refused to provide a proper listing of eligible voters by failing to list eligible employees and listing ineligible employees; and further, reduced the hours of eligible employees and reclassified them as ''casual'' employees based on their union activities and/or support for the Union.

6. The Employer, by its agents, interfered with, restrained, and/or coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act.

The objections of the Petitioner/Union were withdrawn at trial. No evidence was presented with respect to them. Accordingly, they will not be treated of further herein.

V. REMEDY

Having found that the Respondent engaged in unfair labor practices, it shall be recommended that Respondent:

(1) be ordered to cease and desist from its unfair labor practices.

(2) be ordered, to the extent it has not already done so, to reinstate John Gibbs to his former position of employment, and make him whole for any losses he suffered as a result of the discrimination practiced against him.

(3) be ordered to post the notice provided for herein.

(4) and be ordered to take certain affirmative action provided herein designed to effectuate the policies of the Act.

Regarding the consolidated representation case, it will be recommended that the representation case be returned to the Regional Director with the direction to open and count the 37 of the 39 challenged ballots of eligible employees Agonoy, Aloncel, Bagasoni, Bailey, Bautista, Butcher, Cabanizas, Calad, Cardenas, Costa, Dolor, Fukunaga, Hanamoto, Hara, Hisatake, Ishizaki, Kailihiwa, Kanahele, Lotaki, Low, Man Zhang, Moku, Muraoka, Ocariza, Palafox, Rutkiewicz, Sales, Santiago, Sinco, Takara, Tokunaga, Tomita, Tongotea, Toya, Uipi, Ushijuma, and Yonamine; and if the additional ballots give the Union a majority of the total vote, to certify the Union as exclusive bargaining representative of the bargaining unit.

No provision for the conduct of another election is made herein inasmuch as each of Respondent's objections to conduct affecting results of election has been found to be lacking in merit, and all of the Union's objections to conduct affecting the results of election have been withdrawn. It is further recommended that the Respondent's objections to conduct alleged to have affected the results of the election be overruled in their entirety.

CONCLUSIONS OF LAW

1. The Respondent, Sports Shinko (Waikiki) Corporation, d/b/a Queen Kapiolani Hotel, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Hotel Employees & Restaurant Employees' Union, Local 5, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(3) and (1) of the Act by issuing warning notices to its employee John Gibbs, and by thereafter converting him to ''on call'' or casual status, effectively discharging him, and thereby depriving him of benefits and opportunities to work.

4. Respondent has violated Section 8(a)(1) of the Act by interrogating employees concerning their own and other employees union tendencies, activities and leaning; by compelling them to swear on the bible that they will vote against the Union in a Board-conducted election; by keeping employees under surveillance as they engage in union activities such as meeting with officials of the Union; or by threatening them with the closure of its facility or the loss of their jobs if they join or support the Union.

5. The above unfair labor practices have an effect on commerce as defined in the Act.

6. Respondent has not violated the Act in any other respect.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that employee John Gibbs was unlawfully discharged, Respondent shall be ordered to offer him immediate reinstatement to his former position, displacing if necessary any replacement or, if not available, to a substantially equivalent position without loss of seniority and other privileges. It shall be further ordered that John Gibbs be made whole for lost earning resulting from his discharge, by payment to him of a sum of money equal to that he would have earned from the date of his discharge to the date of his return to work, less net interim earnings during that period. Backpay shall be computed in the manner prescribed by *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *Florida Steel Corp*., 231 NLRB 651 (1977).[24] Interest on any such backpay shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It shall be further ordered that the Respondent remove from its records any references to the discharge mentioned, and provide John Gibbs written notice of such expunction, and inform him that the Respondent's unlawful conduct will not be used as a basis for further personnel actions against him.[25]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

[24] See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

[25] See *Sterling Sugars*, 261 NLRB 472 (1982).

[26] All outstanding motions, if any, inconsistent with this recommended Order are hereby denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the

ORDER

The Respondent, Sports Shinko (Waikiki) Corporation, d/b/a Queen Kapiolani Hotel, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their own or other employees union sympathies, activities, or leaning; compelling employees to swear on the bible that they will vote against the Union in a Board-conducted election; keeping the union activities of employees under surveillance by photographing them while they meet with officials of the Union; or by threatening employees with loss of jobs or closure of our facility if they join or support the Union.

(b) Discharging, warning, disciplining, or otherwise discriminating against employees for having engaged in union or other protected, concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(b) Offer, if not already accomplished, John Gibbs immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Remove from its files any reference to the unlawful discharge, and notify John Gibbs in writing that this has been done and that none of these records will ever be used against him in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its offices and facility in Honolulu, Hawaii, copies of the attached notice marked ''Appendix.''[27] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

The challenges to the ballots of the following employees are OVERRULED:

Agonoy, Saturnina	Low, Tina
Aloncel, Carodad	Man Zhang, Ming
Bagasoni, Federrico	Moku, Janet
Bailey, Shareen	Muraoka June
Bautista, Lynn	Ocariza, Narcissa
Butcher, Ninyo	Palafox, Estrelita
Cabanizas, Teodora	Rutkiewicz, Judy Ann
Calad, Benita	Sales, Verona
Cardenas, Walfredo	Santiago, Jose
Costa, Kay	Sinco, Warlita
Dolor, Jay	Takara, Faye
Fukunaga, Geogre	Tokunaga, Shane
Hanamoto, Yoshio	Tomita, Ken
Hara, Frank	Tongotea, Sofia
Hisatake, Phyllis	Toya, Satusuki
Ishizaki, Helene	Uipi, Amelia
Kailihiwa, Simeon	Ushijuma, June
Kanahele, Wilton	Yonamine, Katherine
Lotaki, Peleaise	

The challenges to the ballots of the following employees are SUSTAINED

Kutaka, Chizuko
Shaw, Patrick